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No. 10-461

SUPREME COURT, U.S.
NOV - 5 2010

In the
Supreme Court of the United States

SADEK R. EBEID, M.D., ex rel United States of America,

Petitioner,

-v.-

THERESA A. LUNGWITZ AND MRS. EDWARD C. IRBY, INDIVIDUALLY AND DBA HEALTH RESOURCE CENTER; HOME HEALTH RESOURCES, INC.; THE CROSSING: HOSPICE CARE, INC.;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

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November 5, 2010

QUESTIONS PRESENTED

1. Whether the Court need address the court-created doctrine of "implied false certification" with respect to claims filed under the False Claims Act?

2. Whether the Court should "remove" any particularity requirement in pleading when a *qui tam* plaintiff alleges a theory of liability pursuant to the "implied false certification" doctrine?

3. Whether Petitioner should be allowed to amend his Second Amended Complaint in this matter?

LIST OF PARTIES

Respondent Theresa Lungwitz ("Lungwitz"), a licensed Registered Nurse, was the sole owner of Defendant Health Resource Clinic ("HRC" or "the Clinic"), a private physician practice, until it closed in 2008. HRC physicians were employed by HRC from 1998 until it closed in 2008.

Respondent Lungwitz had been the sole owner of Defendant Home Health Resources, Inc. ("HHR") from on or about November 1, 1999. Respondent Margaret Irby ("Irby") was a co-owner of the HHR between April 1996 until on or about November 1, 1999, when she sold her shares to Lungwitz.

Lungwitz has been the sole owner of Defendant The Crossing Hospice Care, Inc. ("the Hospice"), which became eligible to bill Medicare on or about December 8, 2004. Irby is alleged to have worked with Lungwitz in the Hospice.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Respondent Health Resource Centers LLC is a Delaware corporation.

Respondents Home Health Resources, Inc. and The Crossing: Hospice Care, Inc., are Arizona business corporations.

No Respondent has a parent corporation. No publicly held corporation owns stock of Respondent.

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The opinion of the Ninth Circuit Court of Appeals is correctly reprinted in Petitioner's Appendix [see "Pet. App." at 1a-17a] and is reported at *Ebeid ex rel. United States. v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010).

The opinion of the United States District Court for the District of Arizona is correctly reprinted at Pet. App. at 18a-33a.

JURISDICTION

Petitioner has correctly stated the applicable dates of the Ninth Circuit's decision and its denial of Petitioner's petition for rehearing. The instant Petition was timely filed.

Petitioner also has correctly identified 28 U.S.C. §1254(1) as the basis for this Court's jurisdiction. The Petition raises a question of federal law and challenges a final decision of the Circuit Court.

STATUTES OR PROVISIONS INVOLVED

This Petition concerns the False Claims Act, 31 U.S.C. §3729(a) *et seq.* (2006 ed.). However, the Petition also concerns the pleading standards imposed by Federal Rule of Civil Procedure 9(b).

RESPONSE TO STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Petitioner correctly describes the history of the False Claims Act ("the FCA"), which originated during the Civil War to prevent widespread fraud against the Government. [*See* Pet. at 2, citing *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996).] Given the nature of the Act, "[t]he archetypal *qui tam* FCA action is filed by *an insider at a private company* who discovers his employer has overcharged under a government contract." *Hopper*, 91 F.3d at 1266 (emphasis added).

As the Ninth Circuit noted, Petitioner was "not an insider" in Respondents' businesses and "[did] not raise a typical FCA claim that Lungwitz overcharged the government":

> Instead, Ebeid alleges that all of the Medicare billing submitted by Lungwitz was unlawful under a theory of implied false certification. Ebeid alleges that the illegal corporate structure of the health care businesses gave Lungwitz a prohibited amount of control over the medical decisions of physicians employed in the various enterprises and that the health care businesses illegally referred patients amongst themselves.

Ebeid, 616 F.3d at 996. [*See also* Pet. App. at 5a.]

B. Facts

Petitioner's Second Amended Complaint alleged that Respondents "submitted false certifications to the federal government in connection with Medicare payments." [*See* Pet. at 2-3; See also Pet. App. at 83a-84a.] However, the Ninth Circuit held that the Second Amended Complaint failed "to plead the fraud with some level of specificity" by failing to "supply reasonable indicia that false claims were actually submitted" and by failing "'to give [Lungwitz] notice of the particular misconduct which is alleged to constitute the fraud charged so that [she] can defend against the charge and not just deny that [she has] done anything wrong.'" 616 F.3d at 999 (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001)). [See also Pet. App. at 13a.]

The Second Amended Complaint was based in part on Petitioner's allegation that "[n]either Lungwitz nor Irby were ever licensed as physicians and the Clinic never held any license entitling it to deliver health-care services." [Pet. at 3.] However, the Ninth Circuit noted that "[t]he Second Amended Complaint does not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine." 616 F.3d at 1000. [*See also* Pet. App. at 14a.]

Although Petitioner claims that the Second Amended Complaint was based on Petitioner's version of the "corporate practice of medicine" doctrine [*see* Pet. at 3], the Ninth Circuit concluded that

> [t]he Second Amended Complaint does not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine. Instead, Ebeid baldly asserts that had Lungwitz "not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims." This conclusory allegation is insufficient under Rule 9(b).

616 F.3d at 1000. [*See also* Pet. App. at 14a.]

The Second Amended Complaint did refer to the Stark Act. [Pet. at 3.] However, as the Ninth Circuit stated:

> Although the Stark Act may provide a valid basis from which to imply certification, because it expressly conditions payment on compliance ...[the Second Amended Complaint] simply alleges that Lungwitz "concealed and failed to disclose that the Clinic's physicians had a financial relationship to the Home Health Care Agency and the Hospice to which the physicians referred patients." The only clarification given is that allegedly unlawful "referrals ... were made by physicians who were employed by and whose livelihood depended upon Lungwitz."

616 F.3d at 1000. [*See also* Pet. App. at 15a.] Accordingly, the Ninth Circuit concluded that:

> These general allegations – lacking any details or facts setting out the "who, what, when, where, and how" of the "financial relationship" or alleged referrals – are insufficient under Rule 9(b). As with the corporate practice of medicine claims, a global indictment of Lungwitz's business is not enough.

Id. at 1000 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation omitted). [*See also* Pet. App. at 15a.]

Petitioner also asserts that the "implied false certification" theory of liability means the mere "act of submitting a claim for reimbursement itself implies compliance with governing federal rules," citing *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). [Pet. at 3.] However, in *Mikes*, the Second Circuit specifically rejected the applicability of "implied certification theory" to a claim based on the relevant Medicare reporting provision – 42 U.S.C. § 1320c-5(a) – because it does not contain a requirement for "certification" for payment:

> Instead, § 1320c-5(a) simply states that "[i]t shall be the obligation" of a practitioner who provides a medical service "for which payment may be made ... to assure" compliance with the section. Hence, it may be seen that § 1320c-5(a) acts *prospectively, setting forth obligations for a provider to be eligible to participate in the Medicare program.*

Mikes, 274 F.3d at 701 (emphasis added). Given that "Ebeid's position fail[ed] regardless," the Ninth

Circuit left this question open. 616 F.3d at 998 n.3. [*See also* Pet. App. at 9a.]

C. Proceedings Below

1. Respondents do not challenge the substance of Petitioner's description of the proceedings below. Petitioner's initial and First Amended Complaint were filed under seal, the Government chose not to intervene, and Respondents moved to dismiss both the First and Second Amended Complaints. The district court dismissed the Second Amended Complaint in a detailed 10-page decision. [*See* Pet. App. at 18a-31a.]

2. The Ninth Circuit provided Petitioner with the benefit of every legal ruling. The Ninth Circuit acknowledged that FCA claims could be based on a theory of "implied false certification," and further relaxed Rule 9(b)'s requirements in such cases to a mere showing of "'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" 616 F.3d at 998-99 (quoting *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180 (5th Cir. 2009)). [*See also* Pet. App. at 12a.] However, even with relaxed standards that required only an inference that the clinic's Medicare submissions represented an implied false certification, the Ninth Circuit still found Petitioner's Complaint wanting. The court found Petitioner's allegations regarding the "corporate practice of medicine" to be "bald[] assert[ions]" that Lungwitz "concealed or failed to disclose information affecting the right to

payment ... ." 616 F.3d at 1000. [*See also* Pet. App. at 14a.] Petitioner's allegations regarding the Stark Act were likewise held to be completely overbroad, simply amounting to "a global indictment of Lungwitz's business ... ." *Id.* [*See also* Pet. App. at 14a-15a.] Finally, the court found Petitioner's allegations of implied false certification of compliance with specific Medicare provisions equally lacking in specificity. *Id.*. [*See also* Pet. App. at 15a-17a.]

3. Following the Ninth Circuit's opinion, Petitioner petitioned for rehearing, urging that court to issue an order permitting him to amend his Complaint a third time. Despite an order from the district court dismissing his Complaint [*see also* Pet. App. at 31a-33a], Petitioner never moved the district court for leave to amend, nor did he raise the possibility of amending his Complaint with the Ninth Circuit prior to its opinion. [*See also* Pet. App. at 17a.] However, following the Ninth Circuit's opinion, Petitioner – for the first time – claimed that he had known all along of specific information that could satisfy the specificity requirement of Rule 9(b) but did not include such allegations in any prior version of his Complaint because he was not certain of the applicable amount of specificity required. The Ninth Circuit summarily denied rehearing without inviting a response from Respondents. [*See also* Pet. App. at 34a-35a.]

REASONS TO DENY THE PETITION

Petitioner, a California doctor, brought a complaint against an Arizona health-clinic alleging that every single bill submitted by the clinic to Medicare constituted a violation of the False Claims Act. Petitioner filed his FCA complaint without alleging any particular fraudulent act and without citing any particular Arizona statute or regulation to prove a violation of the "corporate practice of medicine."

Petitioner received multiple opportunities (in the form of an initial, a First Amended, and a Second Amended Complaint) in which to state a valid claim in compliance with Rule 9(b). Petitioner not only failed, he repeatedly asserted (up until argument before the Ninth Circuit) that he needed no opportunity to amend his Complaint, because he already had provided all information available and no additional information was required to assert his theory of liability.

Even after the district court dismissed his Complaint with prejudice, Petitioner still received all available benefits from the rulings of the Ninth Circuit. The Ninth Circuit recognized Petitioner's theory of "implied false certification." The Ninth Circuit analyzed Petitioner's Complaint under a relaxed standard for Rule 9(b). Nonetheless, despite these beneficial rulings, the Ninth Circuit still affirmed the district court's conclusion that Petitioner's Complaint was insufficient.

Given this context, the Petition presents invalid bases for this Court's exercise of certiorari. In an ef-

fort to convince this Court to grant review, Petitioner trumps up a false conflict among the circuits regarding the "implied false certification" theory, despite the fact that resolving this conflict would not change the result in this case. Petitioner also asks this Court to obliterate Rule 9(b)'s pleading requirements, even though the Ninth Circuit provided Petitioner with a relaxed standard for meeting this rule's requirements.

Ultimately, Petitioner's real reason for seeking certiorari is to request an opportunity to amend his Complaint a third time, despite the fact Petitioner claims he knew specific information of a particular fraud all along. Freeing Petitioner from his error and providing him with a "fourth bite at the apple" is an insufficient justification for certiorari.

I. The Implied False Certification Theory is Not an "Important, Recurring" Issue at Conflict Among the Circuits, Nor Is that Theory Relevant to Resolving this Litigation.

Although this Court's Rule 10(a) suggests that one reason for granting certiorari is to resolve a conflict among the circuits, not all disputes warrant the grant of certiorari. The issue also should be "an important and recurring one." *Miroyan v. United States*, 439 U.S. 1338, 1342-1343 (1978) (Rehnquist, J.), *quoted in Michael v. United States.*, 454 U.S. 950, 951 (1981)).

If the issue that Petitioner wants this Court to address is whether the theory of "implied false certi-

fication" should be applied to FCA claims in general, then no conflict appears to exist. The Ninth Circuit joined "the Second, Sixth, Tenth, and Eleventh Circuits" in "endors[ing] the implied false certification theory." *Ebeid,* 616 F.3d at 996. [*See also* Pet. App. at 7a.] Petitioner concedes this point. At best, all Petitioner can assert is that some circuits have not yet fully adopted the doctrine. [*See* Pet. at 8-9.] Accordingly, Petitioner utterly has failed to demonstrate a conflict among the circuits worthy of this Court's exercise of certiorari.

Even if the "implied false certification" theory represents a clear conflict among the circuits, certiorari nonetheless properly may be denied "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court ... ." *See, e.g., Ticor Title Ins. Co. v. Brown,* 511 U.S. 117,122 (1994) (dismissing writ as improvidently granted when "as matters ... develop[ ] it is not clear that our resolution of the [issue] will make any difference even to these litigants").

Here, the Ninth Circuit considered Petitioner's Complaint under the "implied false certification theory." The reason that Petitioner's Complaint failed to state a viable claim for relief has nothing to do with the Ninth Circuit's (or any circuit's) recognition of the "implied false certification" theory. The reason Petitioner's Complaint fails is due to the lack of specificity regarding the alleged fraud. No matter what theory of liability Petitioner asserts, his Complaint still must have some kind of specificity.

Because no real conflict exists among the circuits,

and because the Ninth Circuit afforded Petitioner the benefit of the "implied false certification" theory, the general viability and applicability of this theory is not a worthwhile issue for this Court's consideration.

II. No Conflict Exists Regarding the Applicability of Rule 9(b) to FCA Claims and No Policy Justifications Warrants Petitioner's Requested Complete Evisceration of Rule 9(b)'s Requirements.

Just as with the "implied false certification" theory, Petitioner also received the benefit of the Ninth Circuit's ruling on the applicability of Rule 9(b)'s heightened pleading requirements to his claim. The Ninth Circuit held that

> Ebeid [was] not required to allege "all facts supporting each and every instance" of billing submitted in violation of the Stark Act or the purported bar on the corporate practice of medicine ...

616 F.3d at 999 (quoting *Lee*, 245 F.3d at 1051-52). [*See also* Pet. App. at 13a.] The Ninth Circuit simply held that Rule 9(b) required Petitioner "to plead the fraud with some level of specificity," which in this case, the Ninth Circuit interpreted to mean "use of representative samples." *Id.* However, Petitioner argues that even this requirement is too onerous.

Petitioner again attempts to create a false conflict among the circuits, at least as that conflict might affect his case. Despite citing the opinions of circuits

that apply Rule 9(b) more strictly [*see* Pet. at 12-13], Petitioner avoids the fact that the Ninth Circuit *rejected* application of that stricter standard:

> We do not embrace the district court's categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, *although we recognize that this requirement has been adopted by some of our sister circuits*. ... In our view, use of representative examples is simply one means of meeting the pleading obligation. *We join the Fifth Circuit in concluding*, in accord with general pleading requirements under Rule 9(b), that *it is sufficient to allege* "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."

616 F.3d at 998-99 (emphasis added) (internal citations omitted) (quoting *Grubbs*, 565 F.3d at 190). [*See also* Pet. App. at 12a.] Again, because this false circuit-conflict would not change the result in Petitioner's case, this issue is insufficient to warrant this Court's exercise of certiorari. *Ticor Title*, 511 U.S. at 122 (when this Court's "resolution of the [issue] will make any difference even to these litigants," case is not "certworthy").

Petitioner also suggests that recent changes to the FCA and Medicare-reporting provisions – such such as the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617 (codified as

amended in scattered sections of 18 and 31 U.S.C.) – justify eliminating Rule 9(b)'s requirements for such "Medicare" FCA claims. [*See* Pet. at 15-19.][1] Petitioner has not raised these arguments previously. Accordingly, these arguments do not provide a justified basis for a grant of certiorari. *See, e.g., U.S. v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule, as the dissent correctly notes, precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'").[2]

Finally, Petitioner claims that even the Ninth Circuit's relaxed standard for Rule 9(b) is too onerous when pleading a theory of "implied false certification," because "only those who have unclean hands, or who have partaken in the fraud themselves" would have sufficient information to provide the

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[1] Respondents are aware of only one case addressing Rule 9(b)'s specificity requirements with respect to the Fraud Enforcement and Recovery Act of 2009. *See United States ex rel. Folliard v. CDW Technology Services, Inc.*, 2010 WL 1541224, *10 (D.D.C. 2010) (nonetheless noting that "'Rule 9(b) is analyzed case by case.'") (quoting *United States ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F.Supp.2d 258, 269-70 (D.D.C. 2002)). Without appellate review of any decisions addressing the interplay between the new Act and Rule 9(b), Respondents respectfully submit that this Court's exercise of certiorari would be premature.

[2] Petitioner also suggests that a House bill, H.R. 1788, 111th Cong. (2009) which was only reported out of committee (*see* H.R. Rep. 111-97), is sufficient reason for this Court to exercise its certiorari authority. Respondents simply note that members of Congress have introduced "False Claims Act Correction Acts" previously, and none have yet passed. *See* H.R. 4854, 110th Cong. (2007); *see also* S. 2041, 110th Cong. (2008). Aside from the fact that this legislation has not been passed or signed into law, Respondents assert that this issue is not yet ripe for this Court's consideration.

"dates and descriptions" of the improper billing. [*See* Pet. at 20.] However, Petitioner's belief that he could never meet Rule 9(b)'s requirements under an "implied false certification" theory is contradicted by his final request to amend his complaint in this matter. [*See* this brief, § III, *infra*.]

III. This Court Should Not Grant Certiorari Simply to Permit Petitioner to Amend His Complaint a Third Time with Information Petitioner Claims He Has Known All Along.

The first part of Petitioner's final argument is that this Court should grant certiorari to allow Petitioner to amend his Complaint to satisfy the "new pleading standard announced" by the Ninth Circuit in this case. This argument overlooks the fact that the Ninth Circuit analyzed the Second Amended Complaint under the new standard. *See* 616 F.3d at 999-1000. [*See also* Pet. App. at 13a-17a.]

Petitioner concedes that even his Second Amended Complaint does not meet even this relaxed standard. However, following the argument that Petitioner raised for the first time in his petition for rehearing with the Ninth Circuit, Petitioner now claims that he actually had specific information all along concerning a particular patient that would satisfy this "new" standard. [See Pet. at 22-23.] Apparently, Petitioner now needs an order permitting him to amend his Complaint a third time, despite the fact that he never previously requested such relief from the district court or from the Ninth Circuit. [*See* Pet. App. at 1a-31a.]

Petitioner's final argument is quite surprising. Petitioner confesses that he had specific information, "and had such information at the time the Second Amended Complaint was filed," regarding a specific patient that he *could have used* to satisfy the specific pleading requirement. [Pet. at 23.] However, Petitioner chose not to include this information or even to seek leave to amend the Second Amended Complaint, because he did not believe that this information would be sufficient to satisfy Rule 9(b)'s requirement. Petitioner omitted this information because, given "the state of the law at the time, it was impossible for these allegations to have become part of the record." [Pet. at 23.] Petitioner's decision to omit these allegations from the Second Amended Complaint also ensured that the allegations would not be part of the record, rather than providing the Ninth Circuit (or this Court) with the opportunity to review the analysis of the district court on this point.

Apparently, Petitioner's argument is that despite his knowledge that some form of specificity would be required, because he did not believe that the specific information he had would be sufficient, he elected to produce *no specific information* rather than *some*. Petitioner has been arguing for a more relaxed standard of Rule 9(b) since the Motion to Dismiss. [*See* Pet. App. at 29(a).]

Petitioner's argument is fatuous. It should be rejected out of hand, just as the Ninth Circuit did [see Pet. App. at 32a-33a] when Petitioner raised these precise arguments in his petition for rehearing. [*See* Pet. at 5.] Petitioner does not explain why he did not

submit the information he had and argue for a change in the law. Petitioner simply has waived this issue and seeks certiorari to undo his mistake.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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